SUPREME COURT, U.S.
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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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RULE 29.6 STATEMENT

Tyson Foods, Inc. has no parent company, and no publicly held corporation owns more than 10% of petitioner's stock.

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INTRODUCTION

Plaintiffs persuaded the district court to certify a class of 3,334 Tyson employees even though there were significant differences in the amount of time employees spent on, and were paid for, donning and doffing activities, and hundreds worked no unpaid overtime. The lower courts allowed plaintiffs to ignore these differences and "prove" liability and damages with "common" evidence that presumed that *all* class members are identical to a fictional "average" employee. Unable to reconcile this approach with this Court's recent class action rulings, plaintiffs and their *amici* raise a series of misleading—and, in some instances, false—claims to stave off reversal.

Plaintiffs begin by claiming that Tyson's challenge to class certification is an improper attempt to benefit from record-keeping problems Tyson created by violating a 1996 injunction in *Reich* v. *IBP, Inc.*, 820 F. Supp. 1315 (D. Kan. 1993), *aff'd*, 38 F.3d 1123 (10th Cir. 1994). Br. 1. Plaintiffs did not raise this argument when opposing certiorari, and it is false. In fact, Tyson's K-Code policy here was consistent with the *Reich* court's interpretation of the FLSA and the terms on which the backpay claims were settled. The court there held that Tyson's predecessor, IBP, did *not* have to pay for donning and doffing standard protective equipment and sanitary clothing, or for associated walking between the locker room and work station. 38 F.3d at 1125-26.[1] And although the court

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[1] Plaintiffs also incorrectly assert (Br. 7 & n.1) that Tyson was "found liable" for violating the FLSA in *Guyton* v. *Tyson Foods, Inc.* They cite an order *denying summary judgment* to Tyson, but ignore that Tyson *prevailed at trial* on compensability and good-faith compliance with *Reich*, *see Guyton* v. *Tyson Foods*,

did hold that IBP had to pay for time spent donning, doffing, and cleaning the "unique" protective equipment, the government agreed that four minutes was sufficient compensation for those activities and settled the backpay claims on that basis. See *Alvarez* v. *IBP, Inc.*, 2001 WL 34897841, at *2 & n.3 (E.D. Wash. 2001) (discussing *Reich* litigation), *aff'd in part*, 339 F.3d 894 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005).

Here, consistent with *Reich* and Department of Labor guidance, Tyson paid four (or more) minutes of K-Code time to knife users for the "unique" equipment, and kept records of that K-Code time.[2] But Tyson did not record time spent on the remaining activities that *Reich* held *noncompensable*. Pet.App. 2a.

Plaintiffs also argue (again, for the first time) that Tyson waived its objections to class certification. These assertions are fiction. After plaintiffs sued to obtain larger K-Code payments for knife users and compensation for activities held noncompensable in *Reich*, Tyson "vigorously" resisted class certification "at every turn." Pet.App. 20a (Beam, J., dissenting).

Inc., 767 F.3d 754, 764 (8th Cir. 2014) (affirming verdict). Tyson also prevailed in *Lopez* v. *Tyson Foods, Inc.*, 690 F.3d 869 (8th Cir. 2012).

[2] Tyson's policy of recording K-Code time comports with guidance on the Department's website. *See* Dep't of Labor, *Field Operations Handbook* §31b01a (1996) (employers "may set up a formula by which employees are allowed given amounts of time to perform clothes changing and washup activities"); 29 C.F.R. §785.48(a) ("Time clocks are not required"). The unpublished Opinion Letter cited by plaintiffs (at 8) and the government (at 8 n.2) stating that meatpacking companies must record actual time spent on these activities was sent to the American Meat Institute, not Tyson. It was neither presented nor endorsed in *Reich*.

When they finally address the merits, plaintiffs misread *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). *Mt. Clemens* neither relieves an FLSA plaintiff of the burden of proving that he worked overtime for which he was not paid, nor creates a special rule allowing plaintiffs to prove liability and damages with evidence of a hypothetical average employee derived from a nonrepresentative sample. Moreover, this Court's decisions make clear that class certification cannot be premised on determining classwide liability and damages through a "Trial by Formula," *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011), or with damages models unmoored from the defendant's putative liability to individual class members, *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013). *Infra* §I.

Plaintiffs offer no substantive defense of the inclusion of uninjured people in the class. Instead, plaintiffs invoke waiver, ask the Court to dismiss the writ, and argue that Tyson lacks standing here. These smokescreens lack merit. Plaintiffs rely on them because the lower courts' refusal to decertify a class that indisputably contains hundreds of uninjured members is indefensible. *Infra* §II. The decision below should be reversed.

ARGUMENT

I. A RULE 23 CLASS ACTION OR FLSA COLLECTIVE ACTION MAY NOT BE CERTIFIED BASED ON STATISTICAL EVIDENCE THAT MASKS DIFFERENCES AMONG CLASS MEMBERS.

In defending the class certification, plaintiffs rely on two propositions: (1) district courts have discretion to determine that common questions "[o]utweigh" individual ones, Br. 27-32; and (2) *Mt. Clemens*

created a special rule to facilitate "classwide resolution" of FLSA claims by allowing employees to prove liability and damages with classwide averages, Br. 33-47. Neither is correct.

A. The "Predominance" And "Similarly Situated" Requirements Of Rule 23(b)(3) And The FLSA Require Claims That Are Sufficiently Cohesive To Justify Representative Adjudication.

Plaintiffs misunderstand Rule 23(b)(3)'s "predominance" requirement and the FLSA's "similarly situated" requirement. Predominance is *not* established by counting the common questions to see if they are "greater [in] quantity or importance" than the individual questions. Br. 27. Instead, a court must analyze "the legal or factual questions that qualify each class member's case as a genuine controversy," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997), to decide whether the "proposed class is 'sufficiently cohesive to warrant adjudication by representation,'" *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196-97 (2013). See Tyson Br. 22-25.

Although Rule 23 may impose requirements on class actions that are not applicable to collective actions (cf. Br. 48), a court considering whether plaintiffs may sue on "behalf of" themselves "and other employees similarly situated" under the FLSA, 29 U.S.C. §216(b), must likewise decide whether the claims are sufficiently similar to warrant adjudication by representation (see Tyson Br. 25-27). Plaintiffs provide no other explanation of what that requirement could mean.[3]

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[3] *Thiessen* v. *Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001), the lead case cited by plaintiffs (at 48) and the

Plaintiffs suggest (Br. 29-32) that Tyson conceded below that the question of the compensability of the activities at issue predominates over individualized questions of injury and damages. Initially, plaintiffs waived this objection by not raising it when opposing certiorari. Sup. Ct. R. 15.2. In all events, this suggestion is false. Plaintiffs overlook Tyson's opposition to the motion for class certification, which expressly argued that "[i]ndividual issues will predominate" and "Plaintiffs' state law class is not appropriate under 23(b)(3)." Dkt. 45, at 13-15.

B. The Courts Below Erred In Certifying A Class On The Premise That Plaintiffs Could "Prove" Injury And Damages With Classwide Averages.

As this Court made clear in *Wal-Mart*, 131 S. Ct. at 2561, class certification based on the premise that plaintiffs will establish classwide liability and damages with evidence of a hypothetical "average" plaintiff violates the Rules Enabling Act because it creates the requisite commonality for trial by masking individual differences that are essential to an accurate determination of class members' claims. See Tyson Br. 34-40, 42-44. It also violates due process by depriving defendants of their right to defend against individual claims. *Wal-Mart*, 131 S. Ct. at 2561.

Plaintiffs seek to distinguish this Court's cases on the theory that *Mt. Clemens* created a bespoke rule that "facilitate[s] class certification" in FLSA cases by obviating the need for any evidence that an employee actually worked overtime for which he was not

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United States (at 30), confirms that the analysis must focus on whether plaintiffs' claims and defendant's defenses fairly can be adjudicated in a representative action. *See* Tyson Br. 26 n.3.

properly compensated—*i.e.*, any evidence of liability. Br. 35. According to plaintiffs, *Mt. Clemens* allows a plaintiff to prove both liability and damages by "reasonable approximation," *id.*, a standard that may be satisfied with evidence of the hypothetical "average" employee even if that average does not remotely reflect the plaintiff's unpaid time, *id.* at 34-45. Based on this reading of *Mt. Clemens*, plaintiffs argue that class certification did not alter any rights or deprive Tyson of the ability to litigate any defenses. *Id.* at 49-50. Plaintiffs are wrong.

1. *Mt. Clemens* does not permit use of averages to mask differences that can determine liability and damages.

To defend their claim that plaintiffs can prove both liability and damages by "reasonable approximation," plaintiffs and the government argue that requiring proof that each class member actually performed unpaid overtime "would contradict the central teaching" of *Mt. Clemens*, because it does not give "[d]ue regard" to the employer's failure to keep accurate records, U.S. Br. 27 (alteration in original), and instead rewards that failure, Br. 36.

Mt. Clemens does not hold, however, that the remedy for the employer's failure to keep records is to allow the employee to prevail by raising a mere "just and reasonable inference" that he performed unpaid overtime. It held that the employee must "*prov*[*e*] that he has *in fact performed work* for which he was improperly compensated," but he need only "produc[e] sufficient evidence to show the *amount and extent* of that work as a matter of just and reasonable inference." 328 U.S. at 687 (emphases added). If the employee does both, the "burden then shifts to the employer" to "negative the reasonableness" of the employee's inference or "come forward with evidence

of the precise amount of work performed." *Id.* at 687-88.

Significantly, the Court drew this two-pronged fact-of-injury/estimate-of-damages test from *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). See *Mt. Clemens*, 328 U.S. at 688. *Story Parchment* recognized that

> there is a clear distinction between the measure of proof necessary to establish *the fact* that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix *the amount*. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

282 U.S. at 562 (emphasis added).

Plaintiffs and the government nevertheless assert that the Court necessarily allowed plaintiffs to prove *liability* to 300 workers as a matter of "just and reasonable inference" from the "representative" testimony of the eight employees who testified in *Mt. Clemens*. Br. 34-38; U.S. Br. 17, 26-28. The opinion nowhere states, however, that the testimony of the eight employees was sufficiently "representative" to establish liability and damages for all 300, much less that liability and damages could be established based on their *average*. The Court held only that certain activities were compensable, and that an employee could "show the amount and extent" of unpaid work "as a matter of just and reasonable inference," after he proved (as the Court was "*assuming*") that "he has performed work and has not been paid in

accordance with the statute."[4] *Mt. Clemens*, 328 U.S. at 687-88, 694 (emphasis added).

Nor is it true (U.S. Br. 27) that lower courts have "consistently held" that *Mt. Clemens* permits plaintiffs to prove both liability and damages as a matter of just and reasonable inference. To the contrary, as the Sixth Circuit explained, "*Mt. Clemens Pottery* and its progeny do not lessen the standard of proof for showing that an FLSA violation occurred. Rather, *Mt. Clemens Pottery* gives a FLSA plaintiff an easier way to show what his or her damages are." *O'Brien* v. *Ed Donnelly Enters., Inc.*, 575 F.3d 567, 602 (6th Cir. 2009); see also *Carmody* v. *Kan. City Bd. of Police Comm'rs*, 713 F.3d 401, 406 (8th Cir. 2013); *Kuebel* v. *Black & Decker Inc.*, 643 F.3d 352, 364-65 (2d Cir. 2011); *Brown* v. *Family Dollar Stores of Ind., LP*, 534 F.3d 593, 596 (7th Cir. 2008).[5]

Properly understood, therefore, *Mt. Clemens* did not "facilitate[] class certification"—an innovation that would not be adopted by Rule 23 for another 20 years—by allowing plaintiffs to show the fact of unpaid overtime by "reasonable classwide approximations."[6] Br. 34-35. Even though *Mt.*

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[4] Indeed, the complaint alleged that the employees worked more than 40 hours per week, not including time for preliminary activities or walking to the work station. *See Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 461-62 (6th Cir. 1945).

[5] In fact, the California Supreme Court has rejected the claim that *Mt. Clemens* permits liability to be proven with statistical sampling. *See Duran* v. *U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 41 (2014).

[6] Nor is it necessary to lower the burden of proof of liability to enable effective enforcement that will deter wage-and-hour law violations. *See, e.g.*, Illinois *et al.* Amicus Br. 26-32. An employer that violates the FLSA is liable not only for unpaid wages, but

Clemens was a collective action, this Court defined the plaintiff's burden of proof in *individual*, not classwide terms. See *Mt. Clemens*, 328 U.S. at 687 ("an employee" must prove "that *he* has in fact performed work for which *he* was improperly compensated") (emphases added). Because class certification cannot "abridge, enlarge or modify any substantive right," 28 U.S.C. §2072(b), plaintiffs' burden in a class action is the same.

2. Class certification in this case was inconsistent with *Mt. Clemens*.

Mericle's averages do not provide a basis for proving either the fact of injury (*i.e.*, that individual plaintiffs worked uncompensated overtime) or a just and reasonable approximation of damages. It is undisputed that Mericle's averages masked wide variations in time. Compare, *e.g.*, J.A.142 (time spent donning equipment pre-shift at locker in Fabrication ranged from .583 to 10.333 minutes), with J.A.123 (Mericle's average included 4.56 minutes of time donning equipment pre-shift at locker in Fabrication). And the averages are inflated by activities (such as washing equipment) that many employees did not perform. Tyson Br. 34. Fox's calculations showed that those differences frequently were *determinative* of liability and damages.[7]

Critically, therefore, the government is wrong in asserting that all class members "performed some unpaid work, even setting aside respondents' proof of

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also for liquidated damages, reasonable attorneys' fees, and the costs of the action. 29 U.S.C. §216(b).

[7] *Compare* J.A.139, *with* J.A.141 (showing that if one assumes that all class members spent 15 minutes/day on donning/doffing instead of 18-21 minutes, there are 110 fewer injured class members and damages are reduced by more than $1.78 million).

the amount of time required for pre- and post-shift activities," U.S. Br. 28. Knife users hired after February 4, 2007, when Tyson added "walking" time to the K-Code payment, were fully paid unless their compensable time for donning, doffing, washing and walking is longer than the four to eight minutes Tyson paid. Non-knife users who worked before February 4, 2007 were fully paid unless their compensable time for donning, doffing, and walking is more than the four minutes Tyson paid.[8] Furthermore, plaintiffs' damages expert, Dr. Fox, found that over 200 class members worked *no unpaid overtime* even if Mericle's averages are added to their timesheets, and she admitted that if the actual time were lower than Mericle calculated, the number of uninjured class members would rise. J.A.414-415, 424-425. The jury awarded less than half of what plaintiffs requested, "likely indicating that more than half of the putative class suffered either no damages or only a de minimis injury." Pet. App. 22a (Beam, J., dissenting).

Contrary to plaintiffs' claim, the alternative to Mericle's improper averages is not "hyper-precision." Br. 42. Tyson does not argue that it would be improper to infer that a worker "who spent 18 minutes donning and doffing on Monday spent the same amount of time on Tuesday." *Id.* What is improper is asking this Court to infer that 3,334 employees who performed hundreds of different jobs with varying combinations of protective equipment

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[8] Plaintiffs' assertion that Tyson's current policy of paying at least 20 minutes of K-Code time was based on a new time study (Br. 11) is unsupported by the record (because the court *granted* Tyson's motion in limine), Dkt. 257, at 3, and is also untrue. Tyson made the change as part of a restructuring of the work day, not because of a new time study.

and washing duties each spent *exactly the same amount of time* on donning, doffing and washing activities. And they claim that inference is reasonable even though their own expert admitted it is not. J.A.387 (Mericle conceding there were "different [times] for every single person [his] team measured").

Recognizing the inadequacies of Mericle's averages would not resurrect "the stringent standard of proof rejected in *Mt. Clemens* itself." U.S. Br. 24. As the *Mt. Clemens* dissent emphasized, the Court *rejected* the "formula of compensation" developed by the district court because it was "not in accordance with the findings of the master." 328 U.S. at 695 (Burton, J., dissenting). Under that formula, the district court had awarded damages for the time listed on the time clock records minus a fixed number of minutes it thought were sufficient for most employees to clock in and walk to their work stations. *Anderson* v. *Mt. Clemens Pottery Co.*, 60 F. Supp. 146, 149-150 (E.D. Mich. 1943). The court of appeals deemed that formula "arbitrary" and held that damages could not be based on "conjecture" or "a mere estimated average of overtime worked." *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 465 (6th Cir. 1945). This Court plainly thought the Sixth Circuit had required more certainty about the amount of damages than was appropriate. But the Court's refusal to affirm a recovery based on a formula that *conflicted* with the evidence of the time the employees actually worked dispels any suggestion that plaintiffs can use averages that mask material differences among employees to prove liability or provide a just and reasonable inference of damages.

Here, Mericle's averages necessarily conferred "a windfall" on some class members and "undercompensate[d]" others. *Espenscheid* v.

DirectSat USA, LLC, 705 F.3d 770, 774 (7th Cir. 2013). Because the FLSA "was designed to give specific minimum protections to *individual* workers," not "to promote their interests *collectively*." *Barrentine* v. *Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981), the FLSA cannot be interpreted to sanction that result. Thus, *Mt. Clemens* does not magically make plaintiffs' burden to prove injury and damages disappear.

3. Use of statistical averages violated the Rules Enabling Act and the Due Process Clause.

Even assuming that Mericle's averages could satisfy plaintiffs' burden of both proving the fact of unpaid overtime and showing a just and reasonable inference of the amount of damages, class certification was still improper: it undermined Tyson's ability to rebut plaintiffs' showing and defend against individual claims. Plaintiffs and their *amici* respond with three meritless arguments.

The Presumption Defense. Citing the "fraud-on-the-market" presumption established in *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988), plaintiffs claim that *Mt. Clemens* likewise allows a presumption that an average is a reasonable approximation of the unpaid overtime of each class member without the need for individualized inquiry. See Br. 35; U.S. Br. 16-17. Even apart from the fact that *Mt. Clemens* establishes no such presumption, *supra* pp. 6-9, this analogy is flawed. Tyson rebutted any such presumption by showing that Mericle's averages were *not* a reasonable approximation of the unpaid work of any class member because they were based on employees who performed different jobs and wore different protective equipment that took different amounts of time to don, doff, and clean. See Tyson

Br. 10-12, 29-34; *Espenschied*, 705 F.3d at 775 ("what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample"); *Marshall* v. *Truman Arnold Dist. Co.*, 640 F.2d 906, 911 (8th Cir. 1981) (Secretary cannot obtain damages for nontestifying employees based on projections of unpaid time the defendant rebutted as to the employees who testified).

At a minimum, *Mt. Clemens* and due process allow an employer to rebut an employee's inferential proof of damages with "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence," 328 U.S. at 687-88. And a presumption "should not preclude direct evidence when such evidence is available." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2415 (2014). Just as class certification in a securities fraud action must be denied when the defendant rebuts the factual basis for the presumption of fraud on the market, *id.* at 2415-16, class certification must be rejected in an FLSA case when the defendant rebuts the reasonableness of the inferences from plaintiffs' purported common proof of the amount of unpaid work.

It is no response to say that the jury found Mericle's averages sufficient to justify an award of classwide damages. U.S. Br. 34. Whether an expert model is capable of establishing classwide liability and damages is a question the court must resolve before class certification, not a "merits" question for the jury. *Comcast*, 133 S. Ct. at 1433 & n.5. The court of appeals in *Comcast* affirmed class certification without deciding what it thought was the "'merits'" question of whether the methodology in plaintiffs' damages model was "a just and reasonable inference

or speculative." *Id.* at 1433. This Court reversed, saying that such "reasoning flatly contradicts [the] cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim." *Id.* "Under that logic," the Court explained, "at the class certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

Comcast's reasoning controls here. Once Tyson showed that the Mericle time study neither proved that any class members worked unpaid overtime nor supported a reasonable inference of the unpaid overtime of each class member, the class should have been decertified. Without common proof of injury and damages, Rule 23(b)(3) cannot authorize treating 3,334 employees as a class.

Waiver Objections. Plaintiffs and their *amici* argue that Tyson has only itself to blame for not asserting its defenses because Tyson (1) opposed plaintiffs' request to bifurcate the proceedings, Br. 14, 46; (2) "made no effort to adduce employee-specific rebuttal proof" at trial, *Id.* at 46; and (3) failed to propose subdividing the class and offering its own study, U.S. Br. 21. These arguments are groundless.

In opposing certiorari, plaintiffs failed to make any waiver argument based on Tyson's opposition to bifurcation, thus waiving that objection. Sup. Ct. R. 15.2. Moreover, plaintiffs *abandoned* the request for bifurcation in the revised proposed pretrial order, which the court adopted. Dkt.229, at 4, 6-7. But even aside from these procedural defects, plaintiffs' proposal would not have avoided the "Trial by Formula" to which Tyson objected.

Plaintiffs proposed to have a "liability phase" in which the jury would use Mericle's average time study to decide "the number of minutes it takes to perform the contested activities, and the number of minutes that have not been paid." J.A.112-113. Those averages would then be mechanically applied to each class member's time sheets to calculate damages. *Id.* at 113. Tyson properly objected that "each Plaintiff presents individualized circumstances," and "[t]here is no common evidence that supports classwide liability and does not vary from individual to individual." *Id.* at 115. For that reason (and because it was filed late), plaintiffs' proposed bifurcation would have been prejudicial to Tyson and a waste of resources. *Id.*

Tyson also moved to decertify the class prior to trial, arguing that plaintiffs' proposal to prove classwide liability and damages with Mericle's time study and Fox's damages calculations was an impermissible "Trial by Formula" barred by *Wal-Mart*. See Tyson Br. 8. When plaintiffs used Mericle's time study and Fox's damages calculations as their only classwide proof, Tyson renewed its objection at the close of plaintiffs' case and after the jury's verdict. *Id.* at 14-15. Those actions fully preserved Tyson's objection.

Tyson had no duty to press the point further by seeking to call thousands of class members and asking the jury to make individualized findings for each one. Doing so would have been inconsistent with the foundational premise on which the court denied the decertification motion, Tyson Br. 37-38, and the court's expectation that the parties would work to "arriv[e] at a manageable number of witnesses to be called at trial," Dkt. 180, at 4.

Nor was Tyson obliged to "present[] a study using a different methodology" that divided the class into "more granular categories." U.S. Br. 21. The class consists of 3,334 people who did 420 jobs with various combinations of required and optional equipment that took different amounts of time to don, doff, and clean, and who were paid varying amounts of K-Code time. See Tyson Br. 4-6, 10-14, 29-35; J.A.126-138. Tyson defended the class claims that the district court certified. It had no obligation to defend the case as if it contained numerous subclasses defined along unspecified lines.

If plaintiffs thought more "granular" categories were possible, they should have proposed them as a solution to the deficiencies raised in Tyson's repeated objections to class certification. Tyson is not responsible for plaintiffs' litigation choices. It is *plaintiffs* who must demonstrate compliance with Rule 23, *Comcast*, 133 S. Ct. at 1432, at every stage of the litigation, including "at trial," *Wal-Mart*, 131 S. Ct. at 2552 n.6. Plaintiffs did not do that here.

The Post Hoc Manageability Defense. Finally, plaintiffs argue that the trial confirmed that common questions predominated (Br. 46-47; U.S. Br. 18) and that plaintiffs' claims were "'susceptible of class-wide proof" (U.S. Br. 18 (citing *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1259 (10th Cir. 2014), *petition for cert. pending*, No. 14-1091 (filed Mar. 9, 2015)). This argument begs the question. When courts allow plaintiffs to sweep aside substantial individual differences with evidence of a hypothetical "average" plaintiff, their claims become "capable of class-wide proof." U.S. Br. 18. Conducting 3,334 coin flips would be manageable too, but the fundamental point is that Rule 23 cannot "abridge, enlarge or modify any substantive right," 28 U.S.C. §2072(b). It is no answer

that rights-abridging shortcuts made class-wide resolution possible.

II. A RULE 23(B)(3) CLASS ACTION OR FLSA COLLECTIVE ACTION MAY NOT BE CERTIFIED OR MAINTAINED IF IT CONTAINS UNINJURED CLASS MEMBERS WHO CANNOT BE CULLED PRIOR TO JUDGMENT.

A. Federal Courts Have No Authority To Compensate Uninjured Persons.

Plaintiffs do not dispute that, to have Article III standing, a plaintiff must show that he suffered an "injury in fact" that is fairly traceable to the defendant and likely to be redressed by a favorable decision from the court. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). They nevertheless claim that, when multiple plaintiffs join together in a class action, Article III is satisfied as long as a single class member can make that showing. Br. 52. That argument is fundamentally at odds with this Court's insistence that "Art[icle] III judicial power exists only to redress or otherwise protect against injury *to the complaining party*." *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). Here, the "complaining party" is *every* opt-in plaintiff and class member who, through the procedural device of a class action, join "their separate claims against the same defendants" for adjudication "at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (class action is a species of joinder); see also *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1530 (2013) (employees "become parties" to a collective action if they file "written consent").

The fact that a court may enjoin unlawful action as long as a single plaintiff has standing (Br. 51-52) does not mean that it can award damages to uninjured class members. In the former situation, the court properly enters injunctive relief to redress the plaintiffs' injury even though it may incidentally benefit individuals who would not have standing. But that rationale does not justify an award of damages to a class with uninjured members. A court does not acquire the authority to award damages to uninjured people simply because they are wrongfully included in a class with injured people.

The result is the same even if, as plaintiffs claim (Br. 53), the presence of uninjured class members is viewed as a "merits" question rather than a standing question. The FLSA provides a cause of action for employees to recover "unpaid overtime compensation" from their employer. 29 U.S.C. §216(b). Employees who have no unpaid overtime have no cause of action and cannot be joined in a class action or collective action with others who do.

Plaintiffs may litigate on behalf of a class only if they can "demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551. Thus, where a defendant demonstrates (or, as here, the plaintiffs' expert concedes) that the class includes uninjured individuals, class certification is improper absent proof—not offered here—that there is a mechanism that ensures that uninjured persons will not recover damages.

Plaintiffs argue that the Court should dismiss the second question presented because Tyson has "pulled ... a bait-and-switch" and failed to advocate "a negative answer to the question." Br. 56-57. That is nonsense. Tyson advocates a negative answer to the question whether a class action or collective action

"may be certified or maintained" when it "contains hundreds of members who were not injured and have no legal right to any damages," Pet. (i). It explained (Tyson Br. 51-54) how the lower courts erred in allowing plaintiffs to maintain the class action and proceed to judgment after their own expert admitted there were hundreds of uninjured members. Cf. Pet. 29-30 (making similar argument).

The fact that Tyson gave a qualified negative answer ("no, unless") is not a concession that the position advocated by plaintiffs and adopted by the lower courts is correct because they did not satisfy the "unless." The parties' briefing in this Court illustrates the vast gulf between their respective positions. Citing cases like *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015), and *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009), plaintiffs assert (Br. 54-56) that it is often infeasible for plaintiffs to prove, at the class certification stage, that all class members were injured, and the possibility that some class members may later be found to be uninjured should not preclude class certification because the court can deal with that problem later. Tyson anticipated this argument, criticized *Kohen* (at 46-48), and explained (at 49-51) that *Nexium*'s approach is "seriously flawed and does not provide adequate protections" to ensure that courts not "exceed their constitutional power to remedy injuries."

Indeed, Tyson's fundamental point—confirmed by plaintiffs' submission here—is that plaintiffs and many lower courts too easily assume that the problem of uninjured class members can be resolved at some later time, and that reliance on such an assumption is impermissible. The rigorous culling

requirement that Tyson advocates—and that Article III demands—would change the law in many circuits.

Petitioners may have anticipated (or hoped) that Tyson would criticize *Kohen* and *Nexium* on different grounds, or that it would stake out a more absolutist position, arguing that a single uninjured plaintiff precludes class certification in all circumstances. But Tyson was entitled to "make any argument in support of [its Article III] claim." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). This Court should resolve the second question presented to prevent lower courts from continuing to certify class actions when plaintiffs fail to prove that uninjured members will not recover damages.

B. The Lower Courts' Refusal To Decertify The Class Violated The Foregoing Requirements.

Plaintiffs cannot justify the lower courts' refusal to decertify the class after it became clear that there were numerous uninjured class members.

Plaintiffs first claim that Tyson is really challenging the classwide jury verdict, not class certification, and a challenge to the verdict is "outside the question presented and rests on claims of error that Tyson invited below and lacks standing to assert." Br. 57-58. These diversionary tactics are meritless.

Tyson *is* challenging the refusal to decertify the class because it allowed plaintiffs to use the class action device to obtain damages for those with no injury and violated Article III limitations on the court's authority to award relief. Tyson Br. 49-51. Tyson made the same argument in the Petition (at 29-30), as plaintiffs acknowledged (BIO 19).

Plaintiffs are wrong to suggest (at 58) that inclusion of uninjured persons only implicates the rights of class members. It also affects Tyson's rights because payment of damages to uninjured class members would reduce the damages payable to injured class members, who may then claim they are not bound by the judgment. *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013). A defendant has standing to assert arguments concerning the "rights" and "interests" of class members "to vindicate its own interests" in having the entire class be bound by the judgment. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804-05 (1985). In all events, the arguments Tyson has raised go to the Court's jurisdiction to grant relief to uninjured parties and cannot be swept aside as none of Tyson's business.

As discussed, *supra* pp. 14-15, Tyson did not waive its opposition to the inclusion of uninjured class members by opposing plaintiffs' proposal to bifurcate liability and damages, or by proposing a classwide verdict. And Tyson did not invite the erroneous inclusion of injured class members. Tyson vigorously opposed class certification and had no duty to propose a more limited class definition that would exclude the uninjured class members. Br. 58. It is not clear that could be done, and, in any event, defining a proper class is *plaintiffs'* responsibility. *Supra* p. 16.

Nor can plaintiffs avoid the problem by claiming that the judgment does not award damages to uninjured people. Br. 58-59. That claim is based on speculation that the district court will not "allocate any part of the award to uninjured members." *Id.* at 60. Notably, plaintiffs are silent as to how the court should allocate the award or how it would know that the allocation does not compensate class members or opt-in plaintiffs the jury found to be uninjured.

Indeed, plaintiffs' inability to do so vividly illustrates the Article III problems that arise when courts improperly assume they can kick the problem of uninjured class members down the road in the hopes that some as-yet-unknown solution will present itself.

Plaintiffs dismiss as unsupported (Br. 60) Tyson's point that allocating the award would violate the Seventh Amendment. But in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), this Court held that a court may affirm a jury verdict on liability and order a retrial limited to damages only if the damages issue "is so distinct and separable" that the jury on remand would not have to reconsider any fact found by the jury that determined liability. *Id.* at 499-50. Because it was "impossible" to tell from the record "precisely what" were the terms of the contract found by the jury, and because "the jury cannot fix the amount of damages unless also advised of the terms of the contract," the Seventh Amendment required a new trial on liability and damages. *Id.* So too here, the verdict "contains no discernible guidelines sufficient to establish the individual damages due the limited number of members of the certified class with provable damages." Pet.App. 126a (Beam, J., dissenting).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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